

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

INDUSTRIAL EXCESS LANDFILL,
INC.; B.F. GOODRICH COMPANY;
BRIDGESTONE/FIRESTONE, INC.;
HYMAN BUDOFF; GENCORP, INC.;
GOODYEAR AEROSPACE
CORPORATION; GOODYEAR TIRE
AND RUBBER COMPANY; HYBUD
EQUIPMENT CORPORATION
CHARLES KITTINGER; MERLE
KITTINGER; KITTINGER TRUCKING
COMPANY; MORGAN ADHESIVES
COMPANY; PPG INDUSTRIES, INC.

Defendants.

CASE NOS.

5:89 CV 1988

5:91 CV 2559

JUDGE JOHN M. MANOS

PARTIAL CONSENT DECREE

***De Minimis Contributor Consent Decree Between
United States of America and PPG Industries, Inc.***

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I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9607, and an amended complaint pursuant to Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606, 9607, seeking recovery of costs incurred and to be incurred in responding to the release or threat of release of hazardous substances at or in connection with the Industrial Excess Landfill Superfund Site in Uniontown, Stark County, Ohio ("Site"), and penalties and punitive damages against those defendants that failed to comply with an order issued by EPA under Section 106 of CERCLA.

B. As a result of the release or threatened release of hazardous substances, EPA has undertaken response actions at or in connection with the Site under Section 104 of CERCLA, 42 U.S.C. § 9604, and will undertake response actions in the future. In performing these response actions, EPA has incurred and will continue to incur response costs at or in connection with the Site. Response actions undertaken at the Site to date by EPA and other persons include a remedial investigation and feasibility study; installation and operation of a gas venting system; extension of a municipal water supply to nearby residents; installation of groundwater monitoring wells; periodic groundwater sampling and analysis; a focused feasibility study; and enhancement of vegetative cover over the landfill. On April 7, 2005, a consent decree was entered under which five defendants agreed to implement the final remedy for the Site and to pay \$17,925,000 of EPA's past response costs as well as certain defined interim and future costs and certain response costs incurred or to be incurred by the State of Ohio.

C. EPA has determined the following:

1. prompt settlement with Settling Defendant is practicable and in the public interest within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1);
2. the payment to be made by Settling Defendant under this Consent Decree involves only a minor portion of the response costs at the Site within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1), based upon EPA's estimate that the total of response costs incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund and by other persons exceed \$48,000,000.
3. the amount of hazardous substances contributed to the Site by Settling Defendant and the toxic or other hazardous effects of the hazardous substances contributed to the Site by Settling Defendant are minimal in comparison to other hazardous substances at the Site within the meaning of Section 122(g)(1)(A) of CERCLA, 42 U.S.C. § 9622(g)(1)(A). This determination is based upon evidence indicating that: (a) the Settling Defendant's approximate contribution of waste containing hazardous substances to the Site, relative to the volume of waste at the Site, does not exceed 2 to 3 percent and may be lower; (b) within the waste containing hazardous substances contributed by Settling Defendant to the Site, the concentration of hazardous substances was significantly less than the concentration of hazardous substances in other waste at the Site, and in particular, at least an order of magnitude less than the concentration of hazardous substances in certain bulk solvent waste contributed to the Site by other parties; and (c) the hazardous substances contributed by Settling Defendant to the Site are not significantly more toxic or of significantly greater hazardous effect than other hazardous substances at the Site, and in particular were of less hazardous effect than hazardous substances in solvents contributed to the Site by other parties.

D. Settling Defendant does not admit any liability to Plaintiff arising out of the transactions or occurrences alleged in the amended complaint.

E. The United States and Settling Defendant agree that settlement without further litigation and without the admission or adjudication of any issue of fact or law is the most appropriate means of resolving this action with respect to Settling Defendant.

THEREFORE, with the consent of the Parties to this Consent Decree, it is ORDERED, ADJUDGED, and DECREED:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. § 9613(b), and also has personal jurisdiction over Settling Defendant. Settling Defendant consents to and shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree is binding upon the United States and upon Settling Defendant and its successors and assigns. Any change in ownership or corporate or other legal status of Settling Defendant, including but not limited to, any transfer of assets or real or personal property shall in no way alter Settling Defendant's responsibilities under this Consent Decree.

IV. STATEMENT OF PURPOSE

3. By entering into this Consent Decree, the mutual objectives of the Parties are:

a. to reach a final settlement among the Parties with respect to the Site pursuant to Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), that allows Settling Defendant to make a cash payment, including a premium, to resolve its alleged civil liability under Sections 106 and

107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, for injunctive relief with regard to the Site and for response costs incurred and to be incurred at or in connection with the Site, thereby reducing litigation relating to the Site;

b. to simplify any remaining administrative and judicial enforcement activities concerning the Site by eliminating a potentially responsible party from further involvement at the Site; and

c. to obtain settlement with Settling Defendant for its fair share of response costs incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund, and by other persons, and to provide for full and complete contribution protection for Settling Defendant with regard to the Site pursuant to Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5).

V. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in the statute or regulations. Whenever the terms listed below are used in this Consent Decree, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

b. "Consent Decree" or "Decree" shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, the Consent Decree shall control.

c. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities.

e. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

f. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

g. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

h. "Parties" shall mean the United States and the Settling Defendant.

I. "Response costs" shall mean all costs of "response" as that term is defined by Section 101(25) of CERCLA, 42 U.S.C. § 9601(25).

j. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

k. "Settling Defendant" shall mean PPG Industries, Inc.

l. "Site" shall mean the Industrial Excess Landfill Superfund Site, encompassing approximately 30 acres, located at 12646 Cleveland Avenue in Uniontown, Stark County, Ohio and generally shown on the map attached as Appendix A.

m. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

VI. PAYMENT

5. Within 30 days after entry of this Consent Decree, Settling Defendant shall pay to the EPA Hazardous Substance Superfund \$752,500.

6. Settling Defendant's payment includes an amount for: a) past response costs incurred at or in connection with the Site; b) projected future response costs to be incurred at or in connection with the Site; and c) a premium to cover the risks and uncertainties associated with this settlement, including but not limited to, the risk that total response costs incurred or to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund, or by any other person, will exceed the estimated total response costs upon which Settling Defendant's payment is based.

7. Payment shall be made by Fed Wire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing USAO File Number 1987V23778, EPA Site/Spill ID Number 05-W2, and DOJ Case Number 90-11-3-247/2. Payment shall be made in accordance with instructions provided to Settling Defendant by the Financial Litigation Unit of the United States Attorney's Office for the Northern District of Ohio following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day. The total

amount to be paid by Settling Defendant pursuant to Paragraph 5 shall be deposited by the Department of Justice in the EPA Hazardous Substance Superfund.

8. At the time of payment, Settling Defendant shall send notice that such payment has been made to:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DJ #90-11-3-247/2

Timothy Thurlow
Office of Regional Counsel
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, IL 60604

Chief, Finance
United States Environmental Protection Agency
Region 5, MF-10J
77 West Jackson Boulevard
Chicago, IL 60604-3590

VII. FAILURE TO MAKE PAYMENT

9. If Settling Defendant fails to make full payment within the time required by Paragraph 5, Settling Defendant shall pay Interest on the unpaid balance. In addition, if Settling Defendant fails to make full payment as required by Paragraph 5, the United States may, in addition to any other available remedies or sanctions, bring an action against Settling Defendant seeking injunctive relief to compel payment and/or seeking civil penalties under Section 122(I) of CERCLA, 42 U.S.C. 9622(I), for failure to make timely payment.

VIII. CERTIFICATION OF SETTLING DEFENDANT

10. By signing this Consent Decree, Settling Defendant certifies that, to the best of its knowledge and belief, it:

- a. has conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA, all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, which relates in any way to the ownership, operation, or control of the Site, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant, or contaminant at or in connection with the Site;
- b. has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents, or other information relating to its potential liability regarding the Site after notification of potential liability or the filing of a suit against it regarding the Site; and
- c. has complied and will comply fully with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e).

IX. COVENANT NOT TO SUE BY UNITED STATES

11. In consideration of the payment that will be made by Settling Defendant under the terms of this Consent Decree, and except as specifically provided in Section X (Reservations of Rights by United States), the United States covenants not to sue or take administrative action against Settling Defendant pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 or 9607, relating to the Site. With respect to present and future liability, this covenant not to sue shall take effect upon receipt of Settling Defendant's payment as required by Section VI of this

Consent Decree. This covenant not to sue is conditioned upon: a) the satisfactory performance by Settling Defendant of all obligations under this Consent Decree; and b) the veracity of the information provided to EPA by Settling Defendant relating to Settling Defendant's involvement with the Site. This covenant not to sue extends only to Settling Defendant and does not extend to any other person.

X. RESERVATIONS OF RIGHTS BY UNITED STATES

12. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all matters not expressly included within the Covenant Not to Sue by United States in Paragraph 11. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendant with respect to:

- a. liability for failure to meet a requirement of this Consent Decree;
- b. criminal liability;
- c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments; or
- d. liability based upon the ownership or operation of the Site, or upon the transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Consent Decree by Settling Defendant.

13. Notwithstanding any other provision in this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action or to issue an administrative order seeking to compel Settling Defendant to perform response actions relating to the Site, and/or to reimburse the United States for

additional costs of response, if: information is discovered which indicates that the Settling Defendant no longer qualifies, on the grounds set forth in Paragraph C.3, as a de minimis party.

XI. COVENANT NOT TO SUE BY SETTLING DEFENDANT

14. Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States or its contractors or employees with respect to the Site or this Consent Decree, including, but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claims arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Constitution of the State of Ohio, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.

Except as provided in Paragraph 16 (Waiver of Claims) and Paragraph 18 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 12 (c) or (d) or Paragraph 13, but only to the extent that Settling Defendant's claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

15. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

16. Settling Defendant agrees not to assert any claims or causes of action (including claims for contribution under CERCLA) that it may have for all matters relating to the Site against any other person who is a potentially responsible party under CERCLA at the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that Settling Defendant may have against any person if such person asserts or has asserted a claim or cause of action relating to the Site against Settling Defendant.

XII. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

17. Except as provided in Paragraph 16 (Waiver of Claims), nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. Except as provided in Paragraph 16 (Waiver of Claims), the United States and Settling Defendant each reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

18. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should

have been brought in the instant action; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue included in Paragraph 11.

19. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendant is entitled, as of the date of entry of this Consent Decree, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. 9613(f)(2) and 9622(g)(5), for “matters addressed” in this Consent Decree. The “matters addressed” in this Consent Decree are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person.

XIII. RETENTION OF JURISDICTION

20. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

XIV. INTEGRATION/APPENDICES

21. This Consent Decree and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. The following appendix is attached and incorporated into this Consent Decree:

“Appendix A” is the map of the Site.

XV. PUBLIC COMMENT

22. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States shall file with the Court any written

comments received and the United States' response thereto. The United States reserves the right to withdraw or withhold its consent if comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper or inadequate. Settling Defendant consents to entry of this Consent Decree without further notice, and the United States reserves the right to oppose an attempt by any person to intervene in this civil action.

XVI. EFFECTIVE DATE

23. The effective date of this Consent Decree shall be the date of entry by this Court, following public comment pursuant to Paragraph 22.

XVII. SIGNATORIES/SERVICE

24. The undersigned representative of Settling Defendant and the Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice, or his delegatee, certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such party to this document.

25. Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendant in writing that it no longer supports entry of the Consent Decree.

26. Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of Settling Defendant with respect to all matters arising under or relating to this Consent Decree. Settling Defendant hereby agrees to accept service including, but not limited to, service of a summons, in

that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court.

SO ORDERED THIS ____ DAY OF _____, 2006.

John M. Manos
United States District Judge

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States v. Industrial Excess Landfill, Inc.*, 5:89CV1988 (N.D. Ohio), relating to the Industrial Excess Landfill Site in Uniontown, Ohio.

FOR THE UNITED STATES OF AMERICA

Date: 5/15/06

W. Benjamin Fisherow
Deputy Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Date: 5-12-06

Steve C. Gold
Senior Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
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Washington, DC 20044-7611
Tel. 202-514-5260
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steve.gold@usdoj.gov

GREGORY A. WHITE
United States Attorney
Northern District of Ohio

Date: _____

s/ Steven J. Paffilas _____
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Date: _____

Richard C. Karl
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77 West Jackson Boulevard
Chicago, Illinois 60604

Timothy J. Thurlow
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THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States v. Industrial Excess Landfill, Inc.*, 5:89CV1988 (N.D. Ohio), relating to the Industrial Excess Landfill Site in Uniontown, Ohio.

FOR DEFENDANT PPG INDUSTRIES, INC.

Date: 2/13/06

Michael H. McGarry
Vice President
Chlor-Alkali and Derivatives
PPG Industries, Inc.
One PPG Place, 40th Floor
Pittsburgh, PA 15222

Agent Authorized to Accept Service on Behalf of Above-signed Party:

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Title: Attorney for PPG Industries, Inc.
Address: Dickie, McCamey & Chilcote
Two PPG Place
Suite 400
Pittsburgh, PA 15222
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